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COURT OF CRIMINAL APPEALS
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IN THE COURT OF CRIMINAL APPEALS OF TEXAS AT AUSTIN

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COURT OF CRIMINAL APPEALS
1/29/2019
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KARL DEAN STAHMANN, Appellant

v.

THE STATE OF TEXAS, Appellee

CAUSE NO. 13-16-00400-CR
IN THE COURT OF APPEALS, THIRTEENTH-SUPREME JUDICIAL DISTRICT

Appealed from Cause No. CR2013-409, Comal County, Texas, 207th Judicial District

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BRIEF FOR APPELLANT ON THE MERITS

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Oral Argument Has Been Granted

TABLE OF CONTENTS **PAGE**

INDEX OF AUTHORITIES **PAGE**

Cases

Statutes

Publications

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BRIEF FOR APPELLANT ON THE MERITS

TO THE HONORABLE JUDGES OF THE COURT OF CRIMINAL APPEALS:

COMES NOW, KARL DEAN STAHMANN, appellant, and submits his reply brief in CAUSE NO. PD-0556-18, and shows:

ARGUMENTS AND AUTHORITIES

I. Facts.

The Court of Appeals set forth the facts of the cases in its opinion. The State does not appear to dispute the Court of Appeals statement of the facts. However, Appellant feels it is necessary to address some statements about the facts in the State's brief which may create some confusion.

A. The bottle was not thrown into 'shrubs' or 'shrubbery', as the State claims. The Court of Appeals correctly found the evidence conclusively proved it landed on top of the grass near a tree, and remained on top of the grass, plainly and clearly visible to the officers and other witnesses.

The State's repeatedly asserts Appellant threw it "into a patch of shrub-bery" or "into shrubbery". *State's Brief* at 2, 13, 20 & n.58, 23. But, the Court of Appeals correctly rejected that claim, finding "no such testimony appears in the record". *Stahmann v. State*, 548 S.W.3d 46, 55(Tex.App.-Corpus Christi 2018).[1]

The evidence in **this** trial was that, contrary the State's claim, the bottle landed on top of the grass, in front of a tree, and was plainly and clearly visible through the game fence at all times until officers retrieved it.[2] Ballard expressly testified it **"landed at the base" of the tree** and he could see it sitting there. RR9-117-118, 121-123, 135-136. *See also*, RR9-143. Freeman

> "…testified that he saw the pill bottle in Stahmann's hand, in the air, and on the ground on the other side of the fence. He agreed that he 'never

[1]/ It expressly rejected that the bottle landed in "a patch of shrubbery", "shrubs", or " 'got sub-merged down in some brush area' and was concealed by the bushes'": "… the State directs us to a case arising out of the same accident, in which Stahmann was found to have violated the terms of his unrelated community supervision by, among other things, tampering with physical evidence on July 1, 2012. *See, Stahmann v. State*, No. 03-15-00068-CR, 2016 WL 3974567, at *1(Tex. App.—Austin July 19, 2016, pet. ref'd)(mem. op., not designated for publication). There, the Austin Court of Appeals stated that "the trial court heard con-flicting testimony about whether the pill bottle was visible where it landed on the other side of the fence" and "could have credited the testimony that the bottle 'got submerged down in some brush area' and was concealed by the bushes." *Id*. at *3. **But no such testimony ap-pears in the record before this Court.** In our evaluation of the sufficiency of the evidence, we may not credit testimony that was not before the trier of fact at the guilt-innocence stage. *See Barfield v. State*, 63 S.W.3d 446, 450(Tex. Crim.App.2001)."

[2]/ The 'game fence' is shown in Defendant's Trial Exhibit-1, 3 & 5. RR9-130. It appears to be wires in a pattern of empty 1 or 2 foot 'squares', supported at intervals by poles. RR9-121, 135. Ballard said "it "was very easy -- you know, it was a chain fence. It wasn't a full fence. You could see all the way to the ground on the other side." RR-9121. There is apparently across Heritage Oaks for entry into a sub-division. RR9-131.

> lost sight of it' and that he pointed it out to police as soon as they arrived. Freeman stated that he could see it '[as] plain as day right there in the—**he tried to throw it in the brush, but it didn't make it**.'

548 S.W.3d at 55. *See also, id*., at 52; RR9-169-170, 174, 179-180.[3]

> "It landed right there next to -- to the fence, maybe a couple feet away. … It landed just on the other side of the fence, like I said, maybe 2, 3 feet away from the fence line itself **over by some brush**."

RR9-169-170. He could see it easily through the fence. RR9-180.

> "According to Ballard and Freeman, when police arrived, they advised officers that they saw Stahmann throw something over the fence, and they pointed out where it was. Police were able to retrieve the item that was thrown over the fence—an ordinary orange prescription medication bottle with a label and a white cap. The officer who retrieved the bottle stated that **it was sitting on top of the grass** on the other side of the fence. …"

548 S.W.3d at 52. Deputy Koepp, the first officer on scene, testified he "was 'able to very clearly see'" it when he looked through the fence, and "identify it as an orange prescription medication bottle with a label and a white cap", "'**sitting above the grass**'". *Id*. at 55. *See also,* RR9-308, 355-359.

B. The officers did not "search" for the bottle, but simply retrieved it from where they could see it through the fence.

The State also asserts "[o]fficers gained access to and **searched the area**, locating the bottle…" *State's Brief* at 2-3. In fact, there was no search or need to do so.

[3]/ He immediately recognized it as a pill bottle. RR9-169-170, 178-179, 185.

Ballard and Freeman testified that "when police arrived, they advised officers that they saw Stahmann throw something over the fence, and they pointed out where it was." 548 S.W.3d at 52. *See also*, RR9-122-123, 138, 144, 173, 180, 186, 189. Deputy Koepp

> "testified that when he arrived he '[o]bserved an object over the fence. He agreed that he was 'able to very clearly see it' and he was able to identify it as an orange prescription medication bottle with a label and a white cap. … on cross-examination, he explained that the pill bottle was 'sitting above the grass.' He stated that he could see the bottle through the fence. According to Koepp, a fellow officer tried unsuccessfully to retrieve the bottle through the fence using an extendable baton, but the officers were eventually able to retrieve the bottle by gaining access through a nearby gate.

548 S.W.3d at 55-56. See also, RR9-304-309, 322, 329, 357-359, 370.[4]

> "… [T]here is nothing in this case indicating the officers would not have found the pill bottle had Ballard and Freeman not altered them to it. Instead, the testimony unanimously established that the pill bottle was plainly visible from the accident site, and that it was not difficult to locate in the afternoon daylight."

Id.

II. Alter.

A. The Court of Appeals correctly applied the commonly accepted and legally defined meaning of "alters… a thing" for *Tex.PenalCode,* Sec. 37.09. A change in the physical or

[4]/ Koepp testified he took "maybe 10 or 12 minutes" to get there after being dispatched. RR9-304. When he arrived, he "kind of just assessed the scene. And then I started seeing if anyone hasn't been treated. Made contact with several people. Handed one of my SWAT vests, a medic pouch that consisted of some bandages and that, to a gentleman being treat-ed." RR9-305. He then "went to a location" Ballard and Freeman "told" him, and "observed an object over a fence", "[r]ight over the" fence. RR9-305-308, 328.

geographical location alone of the bottle did not "alter" that "*thing*".

The State correctly notes that when a statute is "clear and unambiguous" courts must give effect to it "plain meaning". *See, Boykin v. State,* 818 S.W.2d 782, 785(Tex.Crim.App.1991) Unless they have a particular legal or technical meaning, words and phrases in the statute are construed under the rules of grammar and common usage. *State's Brief*, at 6. *See, Tex.Gov.Code,* Sec. 311.011. It is presumed the entire statute is intended to be effective. *See,* Tex.Gov.Code, Sec. 311.021(2).

Sec. 37.09 does not define "alter", therefore its commonly understood meaning must be used. The Court of Appeals correctly noted that is "to change, make different, modify." 548 S.W.3d at 54-55; *Williams v. State*, 270 S.W.3d 140, 146(Tex.Crim.App.2008)(citing Webster's Unabridged Dictionary at 52(2nd ed. 1983). The State appears to agree but adds "without changing into something else", or "to change in character or composition, typically in a comparatively small but significant way." *State's Brief* at 7 & n. 2. 17, 18 (citing Merriam-Webster's Collegiate Dictionary(11th Ed. 2012) and Oxford English Dictionary on-line version).

It now argues that "[c]hanging the physical or geographic location of evidence changes the character of the evidence and makes the evidence

different", and the evidence on "alters" is sufficient under that definition. *State's Brief* at 7.[5]

However, Sec. 37.09 does not state "evidence", any more than it states a vague or amorphous concept like a crime scene. It specifies "alters… any record, document or thing." Appellant was charged with altering "a thing, to wit: a bottle of pills". CR-8, 212-17; RR9-59-60, 11-8-17. A "record, docu-ment" and "thing, to wit: a bottle" are specific, discreet physical items. The State does not explain **how** merely moving a "record, document or thing" changes their character or composition or makes those things different. "Character" is relevantly defined as a "distinctive feature or attribute". Webster's New College Dictionary (1995). A feature or attribute is a part of the thing. "Composition" means the discreet elements or parts of which a thing is composed.

The common definition of "alter" requires some change in the thing itself, its physical state or some part thereof. Black's Law Dictionary Free Online Dictionary 2nd Ed. relevantly defines it as:

> "To make a change in; to modify; to vary to some degree; to change some of the elements or ingredients or details without substituting an entirely new tiling or destroying the identity of the thing affected. …"

[5]/ It did not raise this argument in the Court of Appeal,until making it the sole basis of its motions for rehearing. *See*, *Appellant's Reply to State's Motion for Rehearing and Motion for En Banc Reconsideration*, at 2-3, 10 & n.5.

See and cf., Rotenberry v. State, 245 S.W.3d 583, 588(Tex.App.-Fort Worth 2007, pet. ref'd)(applying Black's Law Dictionary with approval in analyzing the meaning of "conceals" in Sec. 37.09).

The difference between "alters a thing" and "alters **the physical or geographic location of** a thing" seems obvious. 'Alters' is the verb and 'thing' the object. In 'alters **the physical or geographic location of** a thing', "alters" remains the verb and 'thing' the object, not 'location'. Merely moving an object does not "make" it "different" or change or modify its character, composition, appearance, elements, ingredients or details. Without more, the "thing" remains exactly the same "thing", whether dropped, thrown, otherwise moved, or simply left in place.

This definition of "alters" is consistent with the need to attach the limit-ing phrase "without changing into something else". *See*, Merriam-Webster's Collegiate Dictionary(11th Ed. 2012); *also*, Black's Law Dictionary Free Online Dictionary 2nd Ed, *supra*. That limit makes no sense if merely moving a thing is "alters" it. Any modification would also require some movement of it or its parts. Thus, *Blanton v. State*, No. 05-05-01060-CR(Tex.App.-Dallas, July 21, 2006, pet. ref'd)(unpublished), held the evidence sufficient to show baggies thrown from a car were "altered" because they were ripped when they hit the pavement. While the change in

the baggies' physical structure and condition made them less useful for their intended purpose, it stopped short of destroying them because they did not "lose [their] underlying identity or be[come] completely unrecognizable". The change of location from throwing is not mentioned at all. *See also*, *Lumpkin v. State*, 129 S.W.3d 659, 661(Tex. App.-Hou[1st]2004, pet. ref'd)("altering" cocaine by ingesting some of it).[6]

In addition, this definition is the only one consistent with the other objects it is an offense to "alter", a "record [or] document". A "statute should be read as whole" in determining the meaning of particular parts. *State's Brief* at 6. That mean the definition of "alters" must be same for each of the objects it relates to: i.e., "record, document or thing". It is absurd to say merely moving (changing physical or geographic location) a "record" or "document" "alters" it. Altering a record or document connotes making a physical change to it, e,g, its form or substance. *See, Tex.PenalCode*, Sec. 37.10("Tampering with a governmental record"); *Ex parte Graves*, 436 S.W3d 395, 397(Tex. App.-Texarakana2014 pet. ref'd); *Maitland v. State*, 993 S.W.2d 880, 881 (Tex.App.-Fort Worth1999, no pet.). Moving it does do that; the record or document remains exactly as it was in form and substance.

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[6]/ *Lumpkin* held the evidence insufficient to prove he knew an investigation was "in pro-gress", the only alternate alleged. *Id*. at 662-63. Thought raised, it did not reach

Further, this definition ("alters" means to make a change in the thing itself, not merely its location) is consistent with the caselaw on "destroys" in Sec. 37.09. *Williams, supra*, contrasted "destroy" and "alter", finding that both mean some physical change in the object, but 'destroys' requires the change be so great the "object lose its underlying identity or be completely unrecognizable." 270 S.W.3d at 146. It rejected the holding of *Spector v. State*, 746 S.W.2d 945, 945-46(Tex.App.-Austin1988, no pet.), that unless the thing's "evidentiary value is destroyed", "'changes in physical form' are mere attempts to destroy or alterations". This Court, however, did not reject the notion that "destroy" and "alterations" are both "'changes in physical form'" (in the case of the former such as shattering the glass pipe).[7] *Rabb v. State*, 434 S.W.3d 613, 616-17(Tex.Crim.App.2014), held 'destroys', 'alters' and 'conceals' "must have an effect distinct from" each other, and "should not be so closely overlapping as to be interchangeable", but "there is a possibility of overlap because "while… each have their own meaning, they are not mutually exclusive". It then held the evidence on "destroys" insufficient because there was no evidence of the "physical conditions of the baggie or its contents". *Id*.

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whether it was also insufficient to prove "alters". *Id*. at 663-64.

[7]/ Thus, it noted that while police attempted "to reconstruct the evidence to its former physical state, it" was "less than a complete crack pipe." 270 S.W.3d at 146. That is also consistent with Judge Womack's concurrence that "while 'destroy' and 'alter' are different they may not be mu-tually exclusive. When something is destroyed, it may be said to have been altered." *Id*. at 147.

at 617. Thus, while 'destroys' and 'alters' both require "changes in physical form" of the "thing", the additional requirement of "loss of underlying identity or [] completely unrecognizable" distinguishes the former from the latter.

Moreover, the State's proposed construction creates such close overlap with "conceals" as to effectively write it out of the statute in most cases, violating the rule that the entire statute is intended to be effective. "Conceal" means "to hide, to remove from sight or notice, or to keep from discovery or observation." *Thornton v. State*, 401 S.W.3d 395, 398(Tex.App.-Amarillo 2013), *rev'd on other grounds*, 425 S.W.3d 289(Tex.Crim.App. 2014); 425 S.W.3d at 307 & n.1(Keller, P.J., concurring). It may occur by only one of two act: 1) moving a thing (e.g., so sight, etc., is blocked), or 2) moving something else (e.g. between thing and observer). The vast majority of cases of tampering-by-concealing involve the first. *See and compare*, cases in (III)(F), *post.* Nothing indicates the Legislature intended to make most of the cases of "concealing" redundant in favor of a much easier proved "alters", the State has discovered 45 years later. *See*, Acts 1973, 63rd Leg., ch. 399, sec. 1.

The State asserts the intent of Sec. 37.09 "was to prevent items in a criminal investigation from losing their evidentiary significance" and "chang-ing the location of evidence may render" evidence "seemingly irrelevant" or "undermine[]" its significance. Yet, the Legislature did not

enact such an expansive statute. Sec. 37.09 instead criminalizes only three specific acts. Indeed, the State appears to have it backwards: a defendant's moving an item often does not reduce its relevance or significance, it **increases** it by making his connection and the suspicion attaching to it more significant. In many cases, it is his movement that first alters investigators to the possible existence of the thing and its potential importance. *See*, cases in (III)(F)(2), *post*. It seems doubtful the State could prove an item was moved, in a way that would be admissible, without also proving **who** moved it.

The Court of Appeals' holding on this issue is correct. Appellant was not charged with altering the "accident scene". The indictment alleges he altered the "**bottle** of pills". There is no evidence supporting a reasonable inference that he changed, modified or made the **bottle** different.

B. *Carnley* expressly did not address whether moving or changing the physical location of a thing by itself proves a completed tampering by "alters"; *Burks*, *Ramos* and *Martinez* did not hold it does by itself, without that also making some change in its physical condition; and, if they did, that should be disavowed.

1. *Carnley.*

Carnley v. State, 366 S.W.3d 830(Tex.App.-Fort Worth2012, pet. ref'd), expressly did **not** hold mere "movement of the" car "constituted an alteration" for Sec. 37.09. It states it was not reaching the issue of whether moving the car "altered" it:

> "The parties each assume that Appellant altered the Pontiac by moving it. **Because it is not an issue in this appeal, we express no opinion as to whether Appellant's movement of the Pontiac constituted an alteration** as required by penal code section 37.09. *See* Tex.R.App. Proc., 47.1, 47.4"

Id., at 834 n. 6. That the parties "assumed" it does not make it a holding of the

case.[8]

2. *Ramos.*

Ramos v. State, 351 S.W.3d 913(Tex.App.-Amarillo2011, pet. ref'd), did not expressly hold that **merely moving** a thing constitutes "alters". The sum of its analysis of the definition of "alters" was that it means "to change or make different", and there was no reason "the act of physically manipulating potential evidence should not be encompassed within that definition", citing *Rotenberry*, *supra*("alteration involves acts that physically manipulate the evidence"). If that meant *any* physical manipulation is "alters", it is far too broad. It would include **every possible act** one could do physically to a thing, all would be some kind of "physical manipulation". For example,

[8]/ The issues actually addressed were sufficiency on intent, and whether it was necessary to show "evidentiary value was diminished in any subsequent investigation." *See*, *id*., at 834-37, and Judge Dauphinot's dissent. Nonetheless, there was evidence defendant in fact changed the physical state of the car. By driving it away, she obviously changed the odom-eter and other mechanical components of the car from what they were when the driver ran from it after colliding with a mailbox or curb, leaving it in gear. She also changed the physical position of its occupants by moving from a passenger to the driver seat, relevant to the evading by driving. She also may have changed things related specifically to the driver, e.g. position of seat, steering wheel etc.

manipulat-ing a record or document by reading it would constitute "alters". So too, pick-ing up an item then putting it back in **exactly the same** location and position. Even the State does not go that far. In short, while every "alters" includes physical manipulation, not every physical manipulation includes "alters".

But, from the language of its holding, its appears *Ramos* did not mean that **merely moving** a thing constituted "alters". Thus, after that discussion on "alters", its stated

> "Given this and the evidence that [defendant's] manipulation of [victim's] body caused its **appearance and position** to be different to be different from the **appearance and position** it would have been in had he not dragged it, we find some evidence upon which a rational jury could find, beyond a reasonable doubt, that he altered the corpse."

Id., at 915. Before that, it had stated the change of "appearance" thus:

> "there appeared **marks on the corpse** apparently caused by the decedent's skin coming in contact with the floor as [he] dragged it. So did [his] action **cause the victim's torso to become exposed**."

351 S.W.3d at 914. Thus, "appearance" seems to be the same as "physical state".

3. *Burks*.

The opinion on original submission in *Burks v. State*, PD-0992-15(Tex. Crim.App., November 2, 2016)(unpublished), was vacated, so not precedent. *See*, *id*.(June 28, 2017)(unpublished).[9] Instead, the Court of Appeals' holding,

[9]/ Doubly so, since unpublished cases themselves are not.

seems to be controlling because on rehearing it states only "the evidence was legally sufficient to establish" the "corpse had been altered" and affirmed. *See also, id*.(November 2, 2016)(Yeary, J., dissenting).

The Court of Appeals did **not** hold the corpse was altered by moving it **alone**. Instead, it stated both that "appellant moved the [] body, an act that altered the body's location", citing *Carnley* and *Ramos*, **and** "appellant's actions **altered the physical state** of the [] body." *Burks v. State*, No. 14-14-00166-CR(Tex.App.-Hou[14th], July 21, 2015) (unpublished). It noted how "the physical state" of the body was altered: "a tear in his boxer shorts and an abrasion under his right eye" that could have come from the road, and the medical examiner said that abrasion "was consistent with skin being scraped over a rough surface", "noted similar abrasions to the complainant's right knee", and the blood patterns suggested the body was dragged. Not only did it not hold that moving by itself constituted "alters", it would be dicta as the changes in physical state were sufficient by themselves. *Id*. n.1. Indeed, **all** of this part of the opinion may be dicta, since the only argument in that Court appears to be that the evidence complainant was dead at the time of the alleged tampering, i.e., a corpse, was insufficient. *See*, Sec. 37.09(c).

This Court's vacated opinion on original submission also did **not** hold the corpse was altered by moving it **alone**. The holding on "alters" was that

the evidence was sufficient "that the dead body…- its location **and physical state** - had been altered." It did note before that an officer testified defendant "altered the corpse by changing its location", **but then said** "[t]he evidence showed" the victim "was shot" and died in defendant's car

> "and he was then pushed or dragged out of [the] car on the street, **sustaining skin abrasions and ripped underwear** which could have occurred from falling or being pulled out of [the] car."

Id. It then noted the same evidence of how the body's "physical state" was altered as the court of appeals.

The court of appeals did not analyze the definition of "alters", merely citing *Carnley* and *Ramos*, and adding parenthetically "evidence sufficient… the record contained evidence defendant dragged a body". *Burks*, *supra*, n.1. This Court's original opinion stated *Ramos* found **both** a change in "position (geographically and physically)" **and its physical state**, and held it sufficient because "appellant's manipulation of the dead body 'caused its **appearance** and position to be different."[10] It did not analyze *Carnley*, thought it incor-rectly said it "held that there was sufficient evidence [] appellant intentionally altered the evidence - a car - because she moved it", explicitly not a holding in *Carnley*. *See*, (II)(B)(1), *supra*.

[10]/ "her body was no longer in the identical position (geographically and physically)" **and** "[T]here appeared marks on the corpse apparently caused by the decedent's skin coming in contact with the floor as Appellant dragged it."

4. *Martinez*.

The State incorrectly asserts *Martinez v. State*, No. 05-17-00817-CR (Tex.App.-Dallas, May 30, 2018), "found the evidence sufficient to support" a "tampering conviction related to the **mere 'alteration' of a bodies location**." *State's Brief,* at 9-10. It also involved a corpse that was **both** moved **and had its physical state changed** (burned). It does state "evidence is 'altered' when its location **or** physical state is changed." It appears to be the first (and only) case expressly stating that in the alternative. However, it did **not** hold the evidence sufficient **solely** because it was moved. It also state *Carnley* "held… appellant altered the evidence by moving the car", but Carnley expressly did **not** hold that. *See,* (II)(B)(1), *supra*. It also states *Ramos* "altered the corpse by dragging" it, but does not state whether that was because he changed the location, caused the "marks" on it and "exposed" the torso, or both. It then states this Court's original opinion in *Burks* "agreed with the reasoning in *Carnley* and *Ramos*" and "determined that pushing or dragging a corpse… onto the street **causing skin abrasions and ripped underwear** was suffi-cient". In other words, it did **not** say *Burks* held moving by itself constituted "alters".

5. Other.

Further, it may be that corpses are just different from other "things".

Sec. 37.09(c) does treat them differently, raising the offense to second degree. They are certainly unique "things", being both the *corpus delicti* and a trove of other evidence.

However, if this Court finds the cases hold moving a "thing" by itself constitutes "alters" under Sec. 37.09, it should overrule and disavow that for the reasons stated in (II)(A) and (B), *supra*. The State argues the Legislature has approved it position by not changing the statute. *State's Brief*, at 10 n.26. But, the cases actual holdings is muddled and unclear at best. No case appears to expressly state them in the disjunctive until *Martinez*. But that unpublished opinion was handed down after the last session, on May 30, 2018.

C. Holding "alters" can be not proved by merely moving or changing physical location does not lead to absurd results, but holding it can does effectively overrule most, if not all, cases finding only an attempted tampering by concealment or destruction, and radically expands the scope and applicability of the third degree felony offense.

The State posits a hypothetical based on a TV show, where police move a gun from a kitchen to beside a "drug-dealer" they killed. *State's Brief*, at 11. It cites two Ohio and one Kentucky cases where items were moved. *Id*., n.29. It does not set forth the statutes in those states. Notably, it does not cite a **Texas** case.

In doing so, however, it reveals it true desire: it would have this Court hold that **anything that changes "a crime scene" is a completed tampering**

under Sec. 37.09. That is for the Legislature to decide. Instead, it has specifi-ed only records, documents and physical "things". Expanding the statute to such a vague, amorphous area, which is not obviously bounded or commonly understood and subject to the whims of individual officers seems a recipe for disaster.

Adopting the State's position also effectively overrules most, if not all, cases finding only attempted tampering, and vastly expands the scope of conduct and number of cases that would constitute "tampering with physical evidence" **without any change in the actor's conduct**. Every case reforming to attempted tampering seems to involve the defendant moving the "thing". *See* e.g., *Rabb, supra*(destroys); *Thornton*, 425 S.W.3d 289(Tex.Crim.App. 2014)(conceals); *Villareal v. State*, No. 13-15-00014-CR, n.4(Tex.App.-Corpus Christi December 8, 2016)(same). Holding "alter" requires **only** moving it or "changing its location" means every case like those state jail felony attempts would be a third degree felony for completed tampering-by-alters, **on exactly the same conduct and evidence**. Indeed, precisely the **same evidence** that proved it was only an attempt ("never lost sight of it") would now prove a completed tampering-by-alters.

In addition, it would effectively overrule many cases finding insuffi-cient evidence for **any offense** because, while those defendant's may

not have attempted to conceal or destroy the thing, they did move it. *Thornton* states "not every act of discarding an object" is a tampering-by-concealing. 425 S.W. 3d at 304 & n.77, and id. at 309-13 & cases discussed in ns. 1, 3, 6-13, 20. *See also e.g.*, *Yarbrough v. State*, 07-14-00044-CR(Tex.App.-Amarillo May 13, 2015, no pet.); *Hollingsworth v. State*, 15 S.W.3d 586, 594-95(Tex.App.-Austin2000, no pet.). But, it certainly is moving and changing the location of the thing, and so a tampering-by-alters under the State's proposed holding.

Further, the State's proposed holding means many offenses that do not presently constitute tampering, including misdemeanors, could become third degree felonies, **again without any change in the actor's conduct.** Thus, e.g., if a person with marijuana or, as in Appellant's case, some other non-felony drug in his pocket **does nothing but walk away** from an officer, with intent it not be found, he will have committed a third degree felony tampering. A person who commits misdemeanor theft, or has other evidence relevant to any number of misdemeanor or even petty offenses, who run from an officer with that intent, no longer merely commits a class A misdemeanor evading but now **also** a third degree felony tampering. Indeed, if done with such intent, why would merely putting drugs, keys to a stolen car, or other evidence of even a petty crime in a pocket not be tampering? *Compare*,

Villareal, n.4 (citing *Thornton*, 425 S.W.3d at 303-06); *Hollingsworth*, 15 S.W.3d at 595.

Likewise, a class A misdemeanor evading could be so elevated, without any change in the actors conduct or the evidence. Evading occurs when she "flees from" an officer attempting to arrest or detain her. *Tex.PenalCode*, Sec. 38.04. "Flees" means moving or changing the location of a person. Evading requires knowledge that an officer is trying to detain or arrest the person, i.e., an investigation. *See*, *Dooley v. State*, 133 S.W.3d 374, 377(Tex.App.-Austin 2004, pet. ref'd). Her moving would then also be a third degree tampering-by-alters by moving or changing the location of a person, a "thing".[11] The same seems true for class A misdemeanor resisting arrest, search or detention by "pulling away", and misdemeanor escape. *See*, *Id*., *Tex.PenalCode*, Secs. 38.03, 38.06; *Finley v. State*, 484 S.W.3d 926, 928-29(Tex.Crim.App.2016).

Finally, this would make the tampering statute so overbroad and vest such wide discretion in police or prosecutors (because the actual charge lodged would be up to them alone), that it would seem to raise significant risks of due

[11]/ It might also be under Sec. 37.09(d)(1), because after the first steps defendant would "know[] an offense" of evading "has been committed", so the next step would be a tampering-by-altering.

process and equal protection violations. *See and cf*., *Kolender v. Lawson*, 461 U.S. 352, 103 S.Ct. 1855(1983).

III. Conceal.

A. The Court of Appeals correctly determined the evidence was insufficient to prove as a factual matter that the bottle was concealed under established law of legal sufficiency and the undisputed facts.

Due process under both federal and state constitutions requires a person must be acquitted if, given all the evidence, a rational jury would necessarily entertain a reasonable doubt on any element of the offense. *See*, *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 2789(1979); *Rabb*, 434 S.W.3d at 616; *Brooks v. State*, 323 S.W.3d 893, 894-95, 899(Tex.Crim.App.2010).[12] The fact finder is the sole judge of credibility and weight of the evidence, resolves conflicts in it and draws reasonable inferences from basic facts proved to ultimate facts. *See*, *Brooks*, *supra*; *Tex.CodeCrim.Proc*., Art. 38.04.

However, an appellant court can not defer to a fact-finder's actual or implied findings and must instead hold the evidence insufficient if, when viewed in the light most favorable to the verdict, (1) the record contains no evidence, or only a "modicum" of evidence, probative on an element of the offense, (2) the evidence conclusively establishes a reasonable doubt. *See*, *Jackson*, 443 U.S. at 314, 318 n.

[12]/ Circumstantial evidence "must be reviewed with the same scrutiny as other elements". *Thornton v. State*, 425 S.W.3d 289, 304(Tex.Crim.App. 2014).

11, 320, 99 S.Ct. at 2786, 2789 n.11; *Matlock v. State*, 392 S.W.3d 662, 667(Tex. Crim.App.2013); *Brister v. State*, 414 S.W.3d 336, 342(Tex.App.-Beaumont2013), *aff'd*, 449 S.W.3d 490(Tex.Crim.App.2014); *also*, *Brooks*, 323 S.W.3d at 916-17(Cochran, J., concurring). [13] In *Evans v. State*, 202 S.W.3d 158, 162-163(Tex.Crim.App.2006), this Court also held that "undisputed facts that allow only one logical inference" can not be discarded or ignored. It discussed with approval and applied the following from *City of Keller v. Wilson*, 168 S.W.3d 802, 814-815(Tex. 2005):

> "… a proper legal-sufficiency review 'prevents jurors from substituting their opinions for undisputed truth.' [] Conclusive evidence is dispositive of the fact or element at issue. Such evidence 'becomes conclusive (and thus cannot be disregarded) when it concerns physical facts that cannot be denied' or 'when a party admits it is true.'

Id. at 163 n.16. Jurors are not permitted to render a verdict contrary to such evidence. *Id*. at n. 15(quoting *Keller*). Only "[w]here there are two permissible views of the evidence" can the reviewing court defer to the factfinder's resolution. *Evans*, 202 S.W.3d at 163.

Further, resolution of evidentiary conflicts must be rational, and inferences drawn reasonable, "based upon the combined and cumulative force of all the evidence". *Hooper v. State*, 214 S.W.3d 9, 15-16(Tex.Crim.App.2007). Each inference must be "supported by the evidence presented at trial", not "based on

[13]/ Noting *Jackson* expressly rejected the 'no evidence' test.

mere speculation". *Id*. at 15.

> "Speculation is mere theorizing or guessing about the possible meaning of facts and evidence presented. A conclusion reached by speculation may not be completely unreasonable, but it is not sufficiently based on facts or evidence to support a finding beyond a reasonable doubt."

Id. at 16.

The Court of Appeals correctly defined "conceal" for sec. 37.09 as "generally understood as 'to hide, to remove from sight or notice, or to keep from discovery or observation.'" 548 S.W.3d at 55. *See, Thornton,* 401 S.W.3d at 398; 425 S.W.3d at 307(Keller, P.J., concurring). It then held the evidence insufficient to prove appellant "did… conceal a thing, to-wit: a bottle of pills":

> "There was no evidence from which a juror could have reasonably inferred that the pill bottle was ever hidden, removed from sight or notice, or kept from discovery or observation. … Instead, the evidence established that the pill bottle remained in full sight of bystanders from the time it was thrown by Stahmann, and of police from the time they arrived, until the time it was retrieved as evidence."

548 S.W.3d at 55-56.[14]

The undisputed evidence is that Ballard and Freeman had nothing to do with

[14]/ The indictment alleged an offense under *Tex.PenalCode*, Sec. 37.09(a)(1) and (d)(1). CR-6-8, 152-154; RR-2-14-15, 27-28, 66, 71. The relevant essential elements are he: (1) "did… conceal a thing, to-wit: a bottle of pills", (2) "knowing that an investigation was pending or in progress" or "that an offense had been committed", (3) with intent to impair its "verity or availability as evidence in the investigation" or its "verity, legibility, or availability as evidence in any subse-quent investigation of or official proceeding related to said offense." *See, Williams,* 270 S.W.3d at 142(both culpable mental states required.) The indictment did not allege intent to impair "legibility" for Sec. 37.09(a)(1). The jury charge mostly tracked it, in the disjunctive in a single paragraph. CR-212-17; RR11-8-17. It also included the lesser included "attempt" offense, by adding "attempt" before "alter, conceal or destroy". *See, Tex.PenalCode,* Sec. 15.01(a).

the incident except as witnesses who called 911 and reported everything they saw to police as soon as they arrived. The bottle was clearly visible to and seen by them from when appellant took it from his pocket, threw it over the game fence and it landed - and remained - on top of the grass in front of the tree some feet or yards away, plainly and clearly visible from the road-facing side of the fence. It did not go into any "shrubbery". They saw it was a prescription bottle from the beginning.

It is also undisputed that when the first officer, Koepp, "arrived on scene, he 'observed an object over the fence'", "was 'able to very clearly see it'" "'sitting above the grass'" and that it was "an orange prescription medication bottle with a label and a white cap". There is no evidence he or other officers would not have seen it there, or have had any difficulty, even without being told. It was not dark or visibility otherwise reduced, and they did not have to search the area for it. "[T]he testimony unanimously established that the pill bottle was plainly visible from the accident site, and that it was not difficult to locate in the afternoon daylight." *Id*. at 56. It was close enough he and Trooper Park tried to retrieve it threw the fence with an asp.[15]

[15]/ The only thing even suggesting otherwise was Koepp's agreeing with the prosecutor say-ing it was "concealed" *Id*. The Court of Appeals correctly rejected this because, first, it is a mere naked and unsupported opinion having no probative value. *See*, *Stahmann*, 548 S.W.3d at 56 n.3(discussing *Buniton v. State*, 482 S.W.3d 58, 74(Tex.Crim.App.2016); *Dallas Ry. Terminal Co. v. Gossett*, 156 Tex. 252, 294 S.W.2d 377, 380-81(1956); and *Yarbrough v. State*, No. 07-14-00044-CR (Tex.App.-Amarillo, May 13, 2015) no

But, at the State's invitation, the Court then held the evidence sufficient for an attempt "including the specific intent element and the 'act amounting to more than mere preparation' element". *Id*. at 58 n.5, 60-61. In other words, it held throwing the bottle over the fence was "an act amounting to more than mere preparation that tends to…" but "failed to effect" commission of the offense because it was not in fact "concealed". *Tex.PenalCode*, Sec. 15.01(a). That was correct: while throwing the bottle **could** have resulted in it being concealed, the evidence showed it in fact did not. That is, either (1) there was no evidence at trial, or only a "modicum" of evidence, probative that the bottle was "concealed", and (2) the evidence conclusively establishes a reasonable doubt to whether it was.

The State does not dispute these facts are as stated by Court of Appeals (with the exception of its 'shrubbery' assertion, which is simply wrong, *see* (I)(A),

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pet.(unpublished)). *See also, Palacios v. State*, 511 S.W. 3d 549. 587(Tex.App.-Corpus Christi2014) no pet.*Natural Gas Pipeline Co. v. Justiss*, 397 S.W.3d 150, 157(Tex.2012). Second, it was contradict-ed and shown unreasonable by the rest of his testimony, as well as conclusively disproved by the other evidence. As the Court noted, he "explained" on cross that it "was 'sitting above the grass'" and he could see it through the fence. *Id*. *See*, RR9-357, *also*, 355-356. Indeed, he testified nonsensically that **objects in open and obvious view are concealed***:*

"Q. … So if something is – if I get this pen, and I throw it, and it lands on this desk, am I concealing it?
A. Did you use it in – to commit an offense or--

Q. I'm just asking you, am I concealing it in that example?
A. Yes.

Q. Okay. So when something is on top of an item in plain view, then its concealed -- ?

supra). Nor does it argue there was other **evidence** proving the bottle was ever concealed in fact. Under *Evans*, and *Wilson*, both *supra*, that would appear to resolve the issue in Appellant's favor.[16]

B. Rather than dispute the facts, the State asks this Court to selectively ignore evidence, redefine "conceal" from the common and court accepted definition and hold a completed offense of tampering-by-conceals is always committed merely by '*attempting to hide evidence before police are present*', even though there was no evidence it was concealed in fact or conclusively established a reasonable doubt whether was.

The State sets forth the holding it would have this Court adopt in its discus-sion of *Thornton*, 401 S.W.3d at 398, and *Villareal*, *supra*, two cases the Court of Appeals found "analogous" to this case. *See, States' Brief*, sec. I(2)(c), at 18-20. It argues:

> "… Appellant **did not commit** the offense **in the presence of someone investigating potential criminal activity**. … **instead of knowing where to look due to first-hand observation of the tampering act**, **law enforcement officers had to be directed to the evidence when they later arrived** on the scene."

States' Brief, at 20.

Thus, it wants this Court to adopt a rule that **as a matter of law a thing is**

A. Yes."
RR9-357-358.

[16]/ It does take exception on one point, but not with the *facts* stated by the Court of Appeals, i.e., that "[t]here is no evidence he or other officers would not have seen it there, or indeed would have had any difficulty doing so, even without Ballard and Freeman telling him." Rather than dispute that there is no such evidence, it argues (when discussing *Munsch*) there is no evidence of the opposite: i.e., they would have seen it without Ballard and Freeman telling him. *State's Brief*, at 22-23. Appellant discusses this *post*.

automatically "concealed", and completed tampering-by-conceal committed, **if a defendant does anything that conceivably might have resulted in concealing it**, i.e. an "'act amounting to more than mere preparation'" of concealing, **when police were not present and ignoring everything else.**

1) The State mischaracterizes the Court of Appeals' holding, saying "[t]he Court of Appeals' interpretation' is that 'an item cannot be concealed if *anyone* else observes it.' *State.s Brief*, at 15, 26-27.[17]

That is not what the Court said or held. Its holding is limited to the facts of Appellant's case: 1) the alleged 'concealing' act was in plain and open view of Ballard and Freeman, 2) their only connection to incident was as witnesses who initiated the investigation by calling 911, remained at the scene and answered investigator's questions until released, 3) they clearly saw the bottle throughout, "never lost sight of it" and recognized it as a prescription bottle, 4) it remained "sitting on top of the grass", plainly visible from the accident site and in full sight of the witnesses, the fence did not hinder or obstruct that in any way, 5) they told police and directed them to it when they arrived, and 6) police saw it when they arrived, recognized what it was and as potential evidence, retrieved it without any

[17]/ The State claims it holds the "if a third party can see the item that has been tampered with, the evidence is insufficient to prove the item has been concealed", and "The Court of Appeals effectively holds that evidence is not 'concealed' if *anyone* observes the item, regardless of whether that person reports it." *Id.*. at 26-27

difficulty or having to search. In other words, it was not just "*anyone* else".[18]

2) The State is asking this Court to selectively ignore evidence, rather than determine sufficiency from *all* the evidence.

Since *Jackson*, at least, it is has been clear that due process under both federal and state constitutions requires sufficiency be determined from **all** the evidence. The reviewing court must defer to the fact finder's decision on any particular evidence if it is open to questions of credibility or weight, or supports conflicting reasonable inferences. But it can not simply **ignore** it and, where it is not subject to such concerns, the reviewing court must accept the facts shown by such evidence. *See*, *Evans*, *City of Keller, Hooper,* all *supra*.

The State is happy to use the **inculpatory** testimony from Ballard, Freeman, and Koepp, i.e., the bottle got where it was because Appellant through it over the fence, his reaction to them seeing it, etc. Of course, without that there would be no evidence at all implicating him.[19] But, it would have this Court simply ignore the rest of the evidence, even though it is **undisputed**: e.g,, Ballard and Freeman saw the bottle from when Appellant took it from his pocket "never lost sight of it" and "pointed it out to police as soon as they arrived"; it was visible from the

[18]/ In addition, it was **not** "regardless of whether that person reports it", but rather because they not only did report it to the officers, but also initiated the investigation itself as 911 callers and remained and answered all questions by investigators until released.
[19]/ Tests on his blood did not find any of the drug in the bottle (promethazine). *See.*RR8-356-362, 9-25-54, 245, 295, 335. As noted *supra,* facts admitted by a party are considered conclusively proven. *See*, *Evans* and *City of Keller, supra*.

accident sight; Koepp saw it "very clearly" "sitting above the grass" when he arrived and recognized its nature and potential relevance, it was clear and open view through the 'game' fence the whole time, and did not have to search for it.

The State does not explain **why** this evidence must be disregarded**.** It does not assert it is open to questions of credibility or weight, or supports conflicting reasonable inferences. The only reason given is because

> "instead of knowing where to look due to first-hand observation of the tampering act, law enforcement officers had to be directed to the evidence when they later arrived."

States' Brief, at 20. It is hard to think of something more offensive to justice, fair trial, due process and constitutional liberty than disregarding evidence simply because the State does not like what it proves.

C. Nothing in Secs. 15.01 or 37.09 makes an attempt to conceal before investigators arrive an automatic completed offense as a matter of law, or requires a law enforcement officers "know[] where to look due to first-hand observation of the tampering act", rather than by "be[ing] directed to the evidence by witnesses when they later arrived on the scene."

1. The only way an attempted tampering-by-conceals can be committed is when a defendant tries, but fails, to conceal a thing from investigators or an official proceeding.

The other two elements are intent: 1) to "destroy, alter or conceal" the thing and 2) make it unavailable in an investigation or official proceeding. *See, Rabb,* 483 S.W.3d at 21; *Thornton,* 425 S.W.3d at 300 & n.59; *Williams,* 270 S.W.3d at 142. Intent can not be 'attempted', if defendant lacks either intent it is not be an

attempt but no offense at all. *See*, *Thornton*, 401 S.W.3d at 402; *Thornton*, 425 S.W.3d at 303-303; *Stewart v. State*, 240 S.W.3d 872, 874(Tex.Crim.App.2007); *Kennedy* v. State, No. 12-08-00325-CR & 12-08-00326-CR(Tex.App.-Tyler, December 23, 2009, no pet.)(unpublished). In other words, the only way to commit an attempted tampering-by-conceal is by doing "an act amounting to more than mere preparation that tends to" but "failed to" in fact "conceal" the "thing". That is also how the jury charge set forth the attempt lesser in this case. *See*, n. 14, *supra*. That can occur in a number way: e.g., he tries to throw it in a container but misses and police see it on the ground, he covers it but the cover blows off before police arrive, c*ompare*, *Stuart v. State*, No. 03-15-00536-CR(Tex.App.-Austin, June 7, 2017, no pet.), or he tries to hide it but an observer never lost sight of it or "clearly" sees it in open view upon looking, *Thornton*, 425 S.W.3d at 306-307, *Villareal*, *supra*. The Court of Appeals found both of these occurred in Appellant's case, the first with Ballard and Freeman and the second with them and with Koepp once he arrived.

The State does not explain **why** investigators must "know[] where to look due to first-hand observation of the tampering act", why "be[ing] directed to the evidence by witnesses when they later arrived on the scene" is not sufficient, or how that **by itself** makes a failed, i.e., attempted, concealing completed. Nor does it explain why the evidence from such witnesses should be relied on when it

inculpates him (he took it from a pocket and threw it over the fence), but not when the **same** evidence **exculpates** (it was not conceal from them and anyone who looked there). Neither does it dispute the Court of Appeals finding that the evidence shows the bottle was visible from the accident scene and the officers would have seen it even if the witnesses had not directed them to it when they arrived - i.e., it was not concealed from them - while none proves they would not.

2. The State confuses "concealing act" with "conceal".

The accepted definition of "concealing" is "to hide, to remove from sight or notice; to keep from discovery or observation." *Thornton*, 401 S.W.3d at 398; 425 S.W.3d at 307 (Keller, P.J., concurring). But, the "concealing act", as the State uses the term, does not mean the same thing. Rather, it is any act more than mere preparation "that **tends to**" result in a thing being "hid[den], remov[ed] from sight or notice; [or kept] from discovery or observation". According to the State, doing that is "concealing" unless an officer is present and sees the act and where it lands the "thing" from first-hand knowledge.

Secs. 37.09(a)(1) and (d)(1) do not make it an offense to engage in a "concealing act", only to "conceal". While a "concealing act" **may** result in a thing being "hid[de]n, remov[ed] from sight or notice; [or kept] from discovery or observation", "conceals" requires that it **did**. This Court in *Thornton* expressly contrasted the jury's findings he "*successfully* concealed the pipe" and "succeeded

in concealing" it with attempt. 425 S.W.3d at 302 n.61, 303 n. 64. That is, it was an attempt **because he tried but did not ""succeed[] in concealing" it**. That is reinforced by the fact that the dissent would have held "with regard to possessory offenses, the tampering-with-evidence statute applies only to [] completed crimes in which the evidence is **permanently** destroyed , altered or **concealed**". 425 S.W. 3d at 313-314 (Cochran, J., joined by Meyers and Johnson).[20] *See also*, *Rabb*, 434 S.W.3d at 617-18(remanding for consideration of attempt when evidence did not prove baggie and contents swallowed were destroyed).

If it were otherwise, a mere attempt to conceal - "a concealing act" with the required intent as in *Thornton* - would **always** constitute a completed tampering-by-conceal. *See*, *Stahman*, 548 S.W.3d at 57("an attempt to conceal" would be "sufficient to show actual concealment"). It would also mean a completed tamper-ing-by-conceal could be proved merely by evidence defendant had the required intents, because the acts which proved those would also prove a "concealing act". Caselaw make clear both are error. *See*, *Thornton*, *Villareal* and *Yarbrough*, all *supra*; *Dooley*, 133 S.W.3d at 379-380(conceal not found despite "attempt[ing] to place" cocaine "in his mouth"); *cf., Rabb, supra*.

Thus, the State's assertions that whether "efforts to conceal evidence are ultimately [un]successful" can not be relevant or dispositive are incorrect, if that

[20]/ It also would have required it have "materially impeded the officer's investigation",

means a completed offense occurs whenever a "concealing act" is not "success-ful", i.e., the thing was not concealed in fact. *See*, *State's Brief*, at 16; *also* at 17 n.42, 24, 25 n.81, 27, 28, 29. That appears to confuse "successfully concealing" with succeeding in making unavailable. The cases cited mean only that when defendant in fact "successfully conceal[s]" a thing, if only for a time, it is not an attempt **merely** because investigators ultimately discover or retrieve it. *See e.g., Gaitan v. State*, 393 S.W.3d 400, 401-402 & n1(Tex.App.-Amarillo2012, pet. ref'd)("officer easily found the pipe in searching the area"); *Turner v. State,* No. 03-18-00266-CR(Tex.App.-Austin, June 19, 2018, no pet.)(unpublished)("deputy found those materials easily"); *Stuart, supra*; *Rodriguez v. State*, No. 13-15-00287-CR(Tex.App.-Corpus Christi, June 30, 2016, no pet.)(unpublished).[21]

The State also errs by claiming that "[u]ntil the witnesses informed Koepp" the bottle "remained concealed… because Appellant made it unnoticeable". *State's Brief* at 29. It absurd to say anything he did made Koepp not notice it **while Koepp was driving there**. It is no more sensible after he arrived: Koepp testified he saw it when he arrived, and there is no evidence reasonably supporting an inference he would have noticed it sooner if it was not thrown. In fact, it was in Appellant's pocket before he threw it, and Koepp did not speak to or search him

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especially where the possessory offense is a misdemeanor.

before speaking to Ballard and Freeman and being told about it. If anything, defendant's act actually made it noticeable sooner. *See*, *Thornton*, 401 S.W.3d at 400; *Hollingsworth*, 15 S.W.3d at 595; *Blanton*, *supra*.

3. There is no textural basis to conclude that a thing is concealed, as the statute uses the term, merely because police were not present or "know[] where to look due to first-hand observation of the tampering act".

Sec. 37.09(a)(1) and (d)(1) do not mention "law enforcement" or "police", or specify any particular persons or class from whom it is concealed. The plain terms are an "investigation" and "official proceeding", so it is logical to construe them to prohibit "conceals a thing" from an "investigation" or "official proceed-ing". But, they do not address whether an investigator must be present at the time of the alleged concealing act, have "first-hand" knowledge "of the tampering act" or the location of the thing, or whether those affect if there is a completed offense, an attempt, or no offense at all. By including "official proceeding[s]", Sec. 37.09 provides that **investigators need not be involved at all**, let alone present at the time or have first-hand knowledge of anything.[22] In addition, because it is not limited to **criminal** investigations or proceedings, it is possible law enforcement might never be involved.[23] The entire statute must be

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[21]/ It is in that situation that courts have said concealment need only be momentary.
[22]/ The jury charge authorized conviction under either "investigation" or "official proceed-ing[s]", and the general verdict of the jury did not specify either. *See*, n.14, *supra*.
[23]/ It would also be an offense to destroy, alter or conceal documents, records or other things during e.g. **civil** discovery or proceedings**.** A criminal charge may be brought on evidence

given effect, a construction which does not is invalid. *See*, Tex.Gov.Code, Sec. 311.011.

Further, the State also does not explain why investigators can not rely on witnesses **who initiated the investigation** by calling 911 but from whom defendant did not in fact conceal the thing to "direct" them to it, or why it matters if they do. Investigators can not have "first-hand knowledge" in **any** case of what that happened before they were present. They require **witnesses** to learn that, even if they immediately observe the thing upon arriving and recognize its relevance. In such cases, they would still require them to learn how it got there and tie it to defendant, if nothing else. *See*, *Graves v. State*, 452 S.W.3d 907(Tex. App.-Texarkana2014, pet. ref'd); *Work v. State*, No. 03-18-00244-CR(Tex.App.-Austin, May 24, 2018, no pet.)(unpublished); *Hollins v. State*, No. 01-14-00744-CR (Tex. App.-Hou[1st] August 27, 2015, no pet.)(unpublished); *May v. State*, No. 07-14-00214-CR(Tex. App.-Amarillo, February 5, 2015, no pet.). Without that there is **no** case at all. *See*, *Yarbrough*, *supra*; *Hollingsworth*, 15 S.W.3d at 595.

There is nothing unusual in that: Police rely on witnesses in investigation and prosecution for **every kind of** offense, from murder to jay-walking. It can be

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from any competent person with knowledge, not just law enforcement. *See*, *Tex.CodeCrim. Proc.*, 2.04, 2.05, 7.01, 7.13, 14.01(a), 15.03(a)(2) & (b), 15.04, 21.20, 21.22; *also*, *Miles v. State*, 241 S.W. 3d 28, 42(Tex.Crim.App.2007); *Peterson v. State*, 781 S.W.2d 933, 935(Tex. Crim.App.1989).

no other way absent a panopticon or absolute police state. Lack of first-hand know-ledge does not inhibit using or acting on information from non-police witnesses, to inculpate **or** exculpate**.** Why should it for an alleged tampering-by-concealing that occurred before they arrived? If investigators observe the thing "clearly" and recognize its potential relevance after they arrive, without speaking to a witness, it would not be concealed in fact from them or subsequent official proceedings. Yet, the State would make that a completed tampering-by-conceal merely because they would not "know[] where to look due to first-hand observa-tion of the tampering act".[24]

Likewise, when the undisputed evidence shows that, while he attempted to, he did not conceal it **from those who *were* present,** how did that conceal it **from those who *were not***, simply because they were not yet there or they were told after they arrived? If defendant attempted but failed to conceal it before they arrived, **and did nothing else**, he still "failed to" conceal it in fact. The Court of Appeals expressly found the evidence showed the bottle was visible from the accident site, and there is no evidence suggesting they would not have seen it in the normal

[24]/ There also can be many reason - having nothing to do with defendant - why investigators might not see the thing immediately, even though it was in open and clear view,. In Appellant's case, it was because Koepp properly decided to check the injured, and during that Ballard and Freeman told him about the bottle. There is no reason to believe he would have noticed the bottle any sooner than he in fact, if had remained in Appellant's pocket instead of being thrown. Yet, the State also would make that a completed tampering-by-conceal because he would not "know[] where to look due to first-hand observation of the tampering act".

course of investigation, even without "be[ing] directed to it". 548 S.W.3d at 55-56. The State does not point to any evidence showing these findings are wrong.

4. Ballard and Freeman were not mere "bystander(s)". They initiated the pending investigation by calling 911.

The law attaches special significance to such witnesses: e.g., finding them "inherently reliable" and authorizing detentions and searches based on their reports. *See, Navarrette v. California*, 572 U.S. 393, 134 S.Ct. 1683(2014); *Smith v. State*, 491 S.W.3d 864, 870(Tex.App.-Hou[14th]2016, pet. ref'd)("inherently reliable"); *State v. Anderson*, 917 S.W.2d 92, 96(Tex.App.-Hou[14th]1996, pet. ref'd)(search warrant). The government records their identities and other informa-tion, and imposes additional legal duties on them. *See, Tex.PenalCode*, Secs. 37.08 (false report), 38.171(failure to report felony), 38.02(b)(failure to identify), 42.06 (false report). They might be said to essentially be *de facto* members of the investigation.

It makes no difference whether they "instantly conveyed to arriving officers that Appellant had" attempted to conceal the bottle. *State's Brief* at 28. Police con-trolled when they spoke to them. Koepp did so, and they told him about it, within some moments of arriving, far less than the 10-12 minutes it took to drive there.

5. **The portion of *Hines v. State*, 535 S.W.3d 102, 110 (Tex. App.-Eastland 2017, pet. ref'd), quoted by the State does not support holding a completed**

> **tampering-by-concealing occurs whenever someone theoretically "hides [it] 'from view before police *notice* it', or "[r]emov[e]" it from "the sight and notice of law enforcement 'called to investigate", when they are not yet there.**

The State reads the quoted passage in *Hines* too broadly. *See*, *State's Brief* (I)(2)(b), at 17-18.[25] First, what is "a dispositive inquiry" in any case is fact-dependent and limited to that case. Each case is judged on its own unique facts. *See*, *Brister*, 449 S.W.3d at 494; *Wise v. State*, 364 S.W.3d 900, 905(Tex. Crim.App.2012). It was dispositive in *Hines* because the officers were the only witnesses. The "concealing" there was of "methamphetamine scattered" on the backseat of the car used to transport defendant to jail, that "remained hidden underneath his body until he got out of the backseat", so they could "not notice it until" then. 535 S.W.3d at 110-111. It was not visible to anyone but defendant for some time. That is the opposite of Appellant's case.

Second, the idea a thing can be "concealed" **even though visible** is limited to situations where **its nature as potential evidence** is somehow hidden. *See***,** *Hines*, 535 S.W.3d at 110("by making it unrecognizable or unnoticeable.") That did not occur here: Ballard, Freeman and police all immediately recognized it was a orange prescription bottle with a label and cap, and might be relevant to the

[25]/ Quoting *it* stating there are two definitions of conceal: "(1) to prevent disclosure or recognition of and (2) to place of out of sight", for the first "invisibility is not a prerequis-ite", and "[u]nder either definition, however, a dispositive inquiry is whether law

investigation or a proceeding. Indeed, *Hines* rejected an argument for attempted tampering because he **in fact concealed it** under his body, in contrast to a witness "never having lost sight of it". *Id*. at 112.

In other words, *Hines* is limited to its facts, which are opposite Appellant's case. As *Work*, supra, states: the "more typical tampering-by-concealment case" is where police observe something indicating defendant may have concealed something during their investigation or admits he did. It is not surprising such cases speak of "police" instead of witnesses when police are the **only** witnesses. But there are others where the alleged tampering act occurred before investigation was pending or police were present.[26] It makes no sense to say the "dispositive inquiry" in those is whether police were present or "noticed the object before defendant tried to hide it and maintained visual contact". Sufficiency in every case is judged on its own unique facts.

D. The Court of Appeals correctly applied *Thornton* and *Villareal* in light of all the evidence.

The Court of Appeals found *Thornton* and *Villareal* "analogous" to this case.

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enforce-ment noticed the object before defendant tried to hide it and maintained visual contact."

[26]/ *See e.g.*, Sec. 37.09(d); *Graves. supra*(hid gun before anyone informed police of shoot-ing); *Martinez, supra*(tried to burn and hide corpse before anyone informed police of kill-ing); *Carr v. State*, No. 03-14-00234-CR(Tex.App. -Austin, February 5, 2016, pet. ref'd) (wrapped and submerged corpse week before death discovered); *Hollins, supra(*hid gun under bush before police arrived); *May, supra(*moved wire bundles to pasture after EMS called); *Ramirez v. State*, No. 11-11-00077-CR(Tex.App.-Eastland, Febraury 7, 2013, pet. ref'd)(unpublished)(hid data card before police arrived).

548 S.W.3d at 55. The State argues *Thornton* should be distinguished because it noted he "'did not throw it, bury it, cover it, hide it, place it out of sight, or otherwise affirmatively attempt to conceal it;' he 'merely dispossessed himself of it'", and "the persons aware of the" thing "at all times" were "**police**" so it "was not removed from the sight or notice of law enforcement". *State's Brief*, at 18-19 (emphasis in original). On *Villareal*, it points out an officer was nearby and saw defendant "'reaching into his short's pocket and then [he] observed a throwing motion' that occurred between parked vehicles." *Id*. at 19. In contrast, it argues, Appellant "threw" the bottle "10-15 feet across a fence line into shrubbery", before "arrival law enforcement" and "someone investigating potential criminal activity" was present, so that "instead of "knowing where to look due to first-hand observation of the tampering act", they "had to be directed to the evidence by witnesses when they later arrived".

First, that misstates the facts of Appellant's case. The assertion he threw it "into shrubbery" is simply wrong *See*, (I)(A), *supra*. *See also*, *Id*, at 20 n.58.[27]

Second, it misanalyzes *Thornton*. The first point is irrelevant and confuses that court of appeal's argument he was not guilty of **any offense,** because he "did not … affirmatively attempt to conceal it. He merely dispossessed himself of it'"

[27]/ N.58 incorrectly asserts "[t]he court of appeals held the pill bottle was concealed despite the fact that it was thrown in a patch of shrubbery." In addition, its comment on *Turner, supra*, seems to imply that the item there was "located lying atop 'freshly mown' grass" was relevant to concealing, when it was only used to connect defendant to it.

See, 401 S.W.3d at 399-400. That has nothing to do with whether it was an attempt: it expressly rejected attempt for acquittal. *Id*. at 401-402. *See also, Thornton v. State*, 377 S.W.3d 814, 818(Tex. App.-Amarillo2012), *vacated*, No. PD-1517-12(Tex.Crim.App., January 9, 2013)(unpublished). This Court recognized that when it reversed and ordered reformation to attempt. 425 S.W.3d at 303-307 and n.77; *also*, *id*. at 307-308(Keller, P.J., concurring); *compare*, *id*. at 308-314(Cochran, dissenting, Meyers and Johnson join). *See also, Hollingsworth* and *Blanton*, both *supra.*

In addition, nothing in it states the presence of the officer had the legal significance now urged by the State. Merely noting that the person who saw the pipe in *Thornton* was an officer begs the question of **whether it matters and, if so, in what way**. Neither the court of appeals or this Court indicated that language was anything but a reference to the case's facts. The State does not explain **why** it necessitates holding a thing was "concealed" in fact when e.g. it "was plainly visible from the accident site", "remained in full sight … of police from the time they arrived, until [] it was retrieved", the first on scene officer testified he saw it when he arrived, he could it "very clearly" "sitting above the grass", and there is no evidence they would not have seen it there or had any difficulty doing so without "be[ing] directed to" it.

Third, *Villareal* is much closer to Appellant's case and supports the Court of

Appeal's holding. The State recites it held the evidence for completed concealing insufficient and reformed to an attempt "[b]ecause the item was not hidden, removed from sight or notice, or kept from discovery or observation …" *State's Brief*, at 19-20. It tries to distinguish that by claiming "the evidence" Villareal "sought to conceal was visible to the **'officers'** investigating criminal conduct at all times." *State's Brief*, at 20.

That is incorrect. The primary witness, Wyatt, was a **civilian** Walmart employee who called 911 and followed defendant across the parking lot. He is the person who saw him with the bottle and throwing it under a car, after which he retrieved it and gave it to the officer. The officer never said he saw the bottle, or **any** object, before Wyatt brought it to him. He testified he did not recall seeing "what was thrown", and only saw defendant "'reaching into his short's pocket and then" "observed a throwing motion", "a toss underhanded", "between parked vehicles". He did not see anything land or go under a car.

The court does not seem to have relied at all on the officer's presence or observations. The part explaining the holding relies on Wyatt's testimony only:

> "Here, Wyatt testified that the pill bottle had not been concealed at any time and that the bottle landed in plain view and was 'not hidden in any way.' There is no evidence that may have supported a finding that Villareal hid the bottle, removed it from sight or notice, or kept it from discovery or observation."

In other words, while the officer was **present**, he did **not** see or "never lost

sight of the bottle, nor have "first-hand knowledge" of where it landed. **The only person who did was the Walmart employee who called 911 and followed defendant.** The officer was merely another witness to defendant apparently taking something from his pocket and throwing it. It is true he did not have "to be directed to it", but that is because Wyatt brought it to him.

Yet, the State does not dispute the correctness of *Villareal*'s holding that the evidence proved only an attempt. Instead, it asserts he did not in fact conceal the bottle (i.e., succeed in concealing it) there because it "was visible to the **'officers'** investigating criminal conduct at all times." *State's Brief*, at 20. In other words, it **elevates the Walmart employee who called 911 to the same level as the officer** (deliberately as the quotes around that term show). But, if he is to be treated as "an 'officer' investigating potential criminal conduct", that is no less so for Ballard and Freeman, who called 911 then walked over "to get a better look at" the bottle and spoke at length with Appellant, told him to remain by his car (which he did), and told Koepp about the bottle. *See, Stahmann*, 548 S.W.3d at 52. If the evidence in *Villareal* was sufficient to prove only an attempt "[b]ecause the item was not hidden, removed from sight or notice, or kept from discovery or observation …" from Wyatt, it is likewise in Appellant's case.

E. The Court of Appeals correctly found *Munsch* and *Lujan* "distinguishable or inapposite". 548 S.W.3d at 56.

1. *Munsch*.

In *Munsch v. State*, No. 02-12-00028-CR(Tex.App.-Fort Worth, August 21, 2014, no pet.)(unpublished), officers, at 10 p.m., tried to stop a car defendant was a passenger in, but it did not stop "for 'several blocks'". They suspected he was "trying to conceal something". They found paraphernalia and a small baggie of methamphetamine on him. He and the driver were arrested. On the way to jail, the driver told that officer that defendant told her not to stop immediately and threw "'eighteen grams of methamphetamine' out" the window, "ten or fifteen feet", when they stopped. They returned to the scene and, after some "difficulty", a search found a large baggie of methamphetamine "in the ditch 'in a 90-degree angle from the road'". The driver did not testify at trial.[28]

That is similar to Appellant's case **only** in that 1) both threw the thing, and 2) the officer did not see it but a witness later told him about it. It is otherwise so factually dissimilar to be distinguished or inapposite. First, the driver/witness in *Munsch* was a putative accomplice. *See, Cook v. State*, 201 S.W.3d 744, 747-48 (Tex.Crim.App.2006); *Dowthitt v. State*, 931 S.W.3d 244, 249 (Tex.Crim.App. 1996). Freeman and Ballard initiated the investigation by calling 911. The law finds the later "inherently reliable", while accomplices are legally unreliable. *See*, (III)(C)(4); *Tex.CodeCrim.Proc.*, Art. 38.14.

Second, the driver did not tell the officer until sometime after they left the

scene, so he had to return to search for it. Ballard and Freeman told Koepp within moments of his arrival.

Third, in *Munsch*, the baggie was down in a ditch, 10 to 15 feet from the road, and the officer had "difficulty locating it with his flashlight given the darkness of the night". In Appellant's case, the bottle was sitting above the grass, almost within reach of the game fence, Koepp testified he saw it when he arrived, they did not have to search for it, and

> "… there is nothing in this case indicating the officers would not have found the pill bottle had Ballard and Freeman not altered them to it. Instead, the testimony unanimously established that the pill bottle was plainly visible from the accident site, and that it was not difficult to locate in the afternoon daylight."

548 S.W.3d at 56.

The State argues the Court of Appeal's "[e]ffectively… claimed that the evidence demonstrates the officers may have found the pill bottle without" being told, but "there is no evidence to support that conclusion." *State's Brief*, at 22-23. That has it backwards: if the State is claim Koepp or other officers could not have found the bottle without being told, it bore the burden of pointing to evidence supporting that. Instead, it merely assumes it. The Court's found such speculation contrary to the evidence: "the testimony unanimously established" the bottle was "plainly visible from the accident site, and… not difficult to locate in

[28]/ The court held she was not an accomplice witness because of that.

the afternoon daylight". The State does not contest that, or note any contrary evidence. In any event, *Munsch* is distinguishable because it was clear there that the officer would not have found it if he was not told since he would not have returned to search, while there is no such evidence here.

It then again wrongly asserts the bottle went "into a patch of shrubbery", *id.* at 23, apparently to make it look more like the baggie down in the ditch being hard to find in the dark during the officer's search with his flashlight in *Munsch*. But, the bottle in Appellant's case was sitting above the grass, "plainly visible from the accident site, and… not difficult to locate in the afternoon daylight", and there is no evidence officers had to search for it at all.

It then claims officers in Appellant's case "would have had no idea the tampering took place without information from the third-party witnesses". *Id*. That is speculation, and contrary the facts. In *Munsch*, she did not tell the officer until after they left, he would not have known to return to look for it if she had not. In contrast, as the Court of Appeals said, in Appellant's case there is no evidence officers would not have seen the bottle if not told, and the evidence actually supports an inference they would have.

2. *Lujan*.

Lujan, *supra*, is a pre-*Thornton* case. The opinion does appear, as this Court of Appeals says, to have "conflated the *actus reus* and the *mens rea* of the

offense, apparently taking evidence of the latter as sufficient to support an affirmative find-ing of the former". 548 S.W.3d at 57. *Lujan* explained its holding on conceal thus:

> "Though the crack pipe was both intact and visible, the evidence we previously alluded to was enough to permit the jury to lawfully infer that **appellant attempted** to prevent the pipe's discovery by throwing it away. Additionally, appellant cites us to no evidence suggesting that the officer would have nonetheless found the pipe had the officer not seen [him] engage in the throwing motion."

It then notes that "[a]ttempting to toss it away can be construed as evidence indicating consciousness of guilt", and the evidence supported reasonable inferences that he "intended to impair" it's "availability as evidence against him".

In other words, it appears to hold Lujan concealed it based only on the evidence that 1) he attempted, and 2) intended to conceal it. *Stahmann* correctly notes that is not sufficient to prove a completed offense: "Actual concealment requires a showing that the allegedly concealed item was hidden, removed from sight or notice, or kept from discovery or observation". 548 S.W.3d at 57. *See*, (III)(C)(1) & (2), *supra*. *Lujan* does not explain **how** it found the pipe was concealed in fact, rather than only an attempt, nor point to other evidence for that beside defendant throwing it to land 15 feet away.[29] This Court of Appeals

[29]/ "[T]he evidence" it "previously alluded to" was only: 1) defendant (and his companion) saw the officer approaching, 2) was nervous, 2) moved his arm "as if he was throwing something", 4) the officer located a crack pipe on the ground "some 15 feet from" him, and 5) after that, he agreed the officer would have arrested him "for that pipe." If there was other evidence in the record, the court did not specify it.

correctly rejected it "to the extent it implies that concealment may be established by mere evidence of the defendant's intent." *Id*.

But, *Lujan* was decided in 2009, before this Court in *Thornton* made it clear that Sec. 37.09 requires "actual concealment", not merely an attempt. In addition, it is distinguished easily. First, Appellant's case has exactly what *Lujan* said was lacking: evidence not only that "the officer would have nonetheless found the pipe". Second, the throwing in *Lujan* occurred while the officer was watching and approaching him. In Appellant's case, the officers were not yet on scene, nor did Ballard or Freeman approach to question him, yet he exposed and drew attention to the bottle by taking it from his pocket and throwing it over the fence. Third, unlike the officer in *Lujan*, they not only clearly saw it and that it was a prescription bottle, they never lost sight of it before, during and after. Fourth, *Lujan* does not say anything about where it landed other than it was 15 feet away, or its condition other than it was "visible". Here, it was clearly visible from the accident scene, sitting on top of the grass, almost within reach from the fence and everyone immediately saw it might be relevant as a prescription bottle.

The State seems to miss this and instead doubles down on what seemed wrong with *Lujan's* analysis, saying it held

> "throwing crack the pipe constituted 'concealment' **because** that affirmative act **was intended** to keep the evidence from discovery … *Lujan* simply reiterated that **the actor's intent coupled with the affirmative act constituted tampering**…"

State's Brief, at 25. That is the problem: since at least *Thornton* it has been clear that **actual** concealment, if only momentarily (i.e. concealing in fact) is required not merely an "affirmative act" or "attempting to conceal".[30] This should also be noted when considering other pre-*Thornton* cases.[31]

F. The cases cited in the State's footnotes, as well as others, seem to support Appellant's and not the State's argument, in so far as they applicable.

They fall into 3 categories: police/investigators arrived after the alleged concealing, were present at the time of and observed the alleged concealing, and were present at the time of but did not observe that.

1. The alleged concealing act was before police/ investigators arrived.

Martinez and *Stuart*, both *supra; Carr v. State*, No. 03-14-00234-CR(Tex. App.-Austin, February 5, 2016, pet. ref'd), *Hollins*, *May* and *Graves*, all *supra*; *Ramirez v. State*, No. 11-11-00077-CR(Tex.App.-Eastland, February 7, 2013, pet. ref'd)(unpublished), and *Hollingsworth*, *supra*, do not support holding attempted concealing is a completed tampering because police were not yet there, did not

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[30]/ It is also why the assertion that "prosecutions for tampering by concealment would rarely occur if concealment were completely successful" are unpersuasive. *Id*. The rub is "com-pletely". It again conflates "ultimately successful" in making the evidence unavailable with concealing it from the investigator, even only momentarily. Thus, cases like *Hernandez*, *Rodriguez*, *Gordwin*, *Gaitan*, *Evanoff*, *Young*, *Scott* and *Lewis*. see, (III)(F)(2), *post*, where an officer see the thing but defendant then removes it from his sight, are distinguished from those like *Thornton* and *Villareal*.

[31]/ *See* e.g., *Scott* and *Lewis*, (III)(F)(2), *post*.

"know[] where to look due to first-hand observation of the tampering act", or had to "be directed to the evidence by witnesses when they later arrived on the scene."

None seem to attach any significance to officers not being present, or lacking "first-hand knowledge" of where to look or the act, in deciding if evidence of concealing was sufficient. Nor are they factually similar to Appellant's case. None have witnesses like Ballard or Freeman (called 911, saw the act, "never lost sight" of the thing, and remained on scene until police arrived, whereupon they told them and pointed it out). Nor do they have officers testifying they saw it when they arrived and recognized what it was and why it might be relevant, evidence and did not have to search for it.

In addition, *Stuart*'s analysis on attempt seems incorrect and unnecessary. He stabbed a man in his apartment then fled. A detective searched the common areas, but not his room, and did not find the weapon. He returned the next day and noticed some boxes on the floor had been moved and, upon lifting one. found it. Defendant admitted returning when nobody was there but denied touching any-thing. It held "the knives had been 'removed from sight or notice' because police were unable to see [them] until they lifted the box covering them." It rejected attempt "because he was ultimately unsuccessful in concealing", while in *Rabb* and *Thornton*, "unlike here, the defendant's failed to conceal anything because police officers saw the items before defendant's began trying to hide

them."

But, as in *Hines*, that analysis is limited to the facts of that case and does not mean an attempt can **only** occur when "officers saw the items before defendant[] began trying to hide them." First, that Stuart "**began trying** to hide them" does not mean he in fact hid, i.e., concealed, them. A mere attempt to conceal does not make a completed offense, even with the required intents. *See*, III(C)(1) & (2), *supra*. As noted *supra*, many acts can "try[] to hide" things but leave them in open and clear view: e.g., where he tries to hide it but an observer never lost sight of it, *Thornton*, 425 S.W.3d at 306-307, *Villareal*, *supra*, to throw it in a trash can but missed and police saw it on the ground when they arrive, or - like *Stuart* - to cover it but failed because the cover is off when police arrive.

Second, discussion of *Rabb* and *Thornton* was unnecessary. It did not involve a defendant who attempted but failed to hide it. He put it under an opaque box. That in fact hid or removed it from the detective's sight when he returned to the re-examine room, it literally covered the knife. That is the core of "conceal". *See, Thornton*, 425 S.W.3d at 307-308(Keller, P.J., concurring). Nor did *Stuart* analyze the issue beyond noting it did not fit the specific facts of *Rabb* and *Thornton*.

In turn, *Hollins* and *May* relied on additional facts beyond the item not being in view when investigators arrived. *Hollins* noted it was a tenth of a mile from the

incident and officers not only did not see it when they arrived and searched the area, they **could not** until a canine search discovered it hours later "under a bush".[32] It held "because [it] was found **underneath a bush and only after a dog** had performed a **search** of the area, the jury could have reasonably inferred" he "concealed the handgun with intent to impair its availability as evidence." It cited *Bennett v. State*, No. 14-02-00647-CR(Tex.App.-Hou[14th] July 31, 2003, no pet.), noting it affirmed where officers discovered contraband hidden in tree moss only after a dog alerted on it.

In *May*, defendant and the deceased, Kelly were supposed to be inspecting power lines, but Kelly was electrocuted while they were stealing the copper wires. Defendant, or a passerby at his behest, called EMS and he was present when they and fire inspector Brown responded. Brown later located bundles of copper wire in a pasture, but they were gone when he returned with police. Defendant later admitted he tossed the bundles "into the pasture away from the immediate area surrounding the incident before officials arrived in response to the 911 call", and later took them from there. He ultimately turned them over to police. In holding it sufficient the court also noted that even as he "admitted to having tossed the wire over the fence", he affirmatively mislead "officials to perceive the incident as a

[32]/ Witnesses saw him shoot the deceased then run off, and one phoned for emergency assistance. About two hours later, officers found some clothing matching defendant's about a tenth of a mile away. A canine officer was dispatched and his dog found the murder weapon "under a bush 'about 30 feet' from the" clothing. At trial, defendant claimed he

simple industrial accident", "attempting to hide … that the two men had been stealing copper wire".

Ramirez is a pre-*Thornton* case and also factually distinguished. A shopper (Ruiz) saw defendant taking photos "of the posteriors of underage women", and store employees called police. Defendant left. Ruiz followed, confronted him and told him police were on the way. Defendant tried to hide in the parking lot, then crossed the street and hid behind a building. When police later arrested him, the camera's datal card was missing. He was later recorded telling a bondsman that he discarded it. A police search then located it in a drainage culvert along his route. The court held evidence sufficient on concealing because "it was reasonable to infer that, as he fled from the shopping mall with Ruiz in pursuit," he "threw the media card in a drainage culvert in an attempt to conceal it."

But, Ruiz did not see Ramirez throw the card into the culvert, "never lost sight of" it, or see where it landed. He did not see the card at all. Rather, than "sitting on top of grass", it was in a drainage culvert. Police did not see it when they arrived or searched the first time, nor did any witness indicate where it was. Instead, police had to return later, after the admission, and search along his route.

In addition, the language of this pre-*Thornton* case shares a common failing with *Lujan*: it misdefines "concealment as used in the context of Section 37.09" as

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"did not 'hide' the handgun under a bush" and "just threw everything" while running.

"the affirmative act of doing something with an item of evidence with the intent of making [it] unavailable in a subsequent investigation." It also unnecessarily con-fuses the quantum of proof for concealment by characterzing defendant's act as "an attempt to conceal it." He did not merely "attempt", but **in fact did conceal it**: no one saw it before police found it and there is no reason any one would.

Finally, *Martinez, Carr and Graves* are inapposite. In *Graves*, the gun was never found, so remained concealed in fact. In addition, its discussion of conceal is *dicta* since defendant was acquitted because he was charged under Sec. 37.09(a)(1) only but the evidence was insufficient for that. *Id*. at 920-922. *Martinez* and *Carr* involved concealing corpses.[33] *See also, Hollingsworth, supra*.[34]

2. Police/investigators were present at the time of and observed the alleged concealing act, but no one saw the "thing" until after a search.

These are opposite Appellant's case: after seeing an officer, defendant put the thing out of the officer's (and any other witness') sight, notice or recognition,

[33]/ In *Martinez* defendant was a party to tampering with a corpse by "altering, destroying or concealing" where the body was wrapped in a rug, dumped in a field and set on fire. Officers discovered the partially burned body sometime after the men returned to their apartment. In *Carr* defendant killed the deceased then wrapped her body in a tent and submerged it in Lake Travis with make-shift anchors, where it was found about a week later.

[34]/ *Hollingsworth, supra,* framed the issue as sufficiency of intent to make unavailable and held it insufficient because there was no evidence he put the cocaine in his mouth **after he encountered police**, the undisputed evidence was "it was very common to carry cocaine in the mouth", and "there was no evidence in the record" he "was carrying" it "in his mouth" "in order to hide it". *Id*. at 594-595.

and it was seen only after a search. *See*, *Hernandez v. State*, No.13-14-00486-CR(Tex. App.-Corpus Christi, June 30, 2016, no pet.)(unpublished); *Rodriguez*, *supra*; *Gordwin v. State*, No. 01-14-00343-CR & 01-14-00344-CR(Tex.App..-Hou[1st] April 30, 2015, no pet.)(unpublished); *Gaitan*, *supra*; *Evanoff v. State*, Nos. 11-09-00317-CR & 11-09-00318-CR(Tex.App.-Eastland, April 14, 2011, pet ref'd); *Young v. State*, No. 07-09-0229-CV(Tex. App.-Amarillo, November 30, 2010, no pet.) (unpublished); *Scott v. State*, No. 10-07-00238-CR (Tex.App.-Waco, May 1, 2009, no pet.)(unpublished); *Lewis v. State*, 56 S.W.3d 617(Tex.App.-Texarkana 2001, no pet.).[35] *See also*, *Hines*, discussed in (III)(D), *supra*.

[35]/ The State cites these at 16 ns. 38 & 39, 17 ns. 42 & 43, 18 n.44, and 24-25 n.81 & 82.

In *Hernandez*, the officer stopped a car around 1:30 a.m. and, when defendant exited, saw "his hand drop[ped] down to the … runner". A search using his flashlight found brillo and a crack pipe under the car. Defendant also was recorded saying he "should have thrown it forward." It held conceal proved because they "was not found in 'plain sight'" and "[r]ather than exposing" them, he "acted to removed the items from sight."

In *Rodriguez*, it was 11:30 p.m., the officer saw a baggie in defendant's hand who when asked about it "turned away to block" the officer's "view of his hands", moved it to his other hand and "began clenching" it "rapidly 'as if [] trying to grind something up." After prying his hand open, officers found cocaine.

In *Gordwin*, police saw defendant trying to flush bags down a toilet and after they "re-moved it from the base [on] the floor" found a baggie with cocaine. But, the holding on conceal also may be *dicta* as the indictment alleged only destroyed or altered and, while the jury charge added conceal (apparently unobjected), the court held it reasonably could have inferred other cocaine was destroyed or altered.

In *Gaitan*, at midnight, the officer saw defendant discard something metallic while refusing to stop, a search produced a handgun, and defendant claimed he "was merely throwing away a beer can". *Id*. at 401

In *Evanoff*, defendant grabbed baggies off the trunk of a vehicle and threw them on the ground.

The only lesson from them seems to be that evidence of conceal is sufficient if such fundamentally different facts are proved. But, it also seems relevant that even here, in finding it sufficient, some noted it was dark and police had to search before finding the items. *See*, *Hernandez, supra*; *Gaitan*, 393 S.W.3d at 401-402 ("discarding the object into the night").[36]

3. Police were present at the time of, but did not observe, the alleged concealing act, or the thing before finding it.

These cases are even further removed factually from Appellant's because **no one** saw either the alleged concealing act **or** the "thing" before it was found later. *See, Turner, supra*; *Work, supra*; *Tooker v. State*, No. 03-17-00348-CR

In *Young*, defendant refused to spit out a "rocklike substance" the officer noticed in his mouth, resisted efforts to open his mouth or keep him from swallowing it, and he did swallow it.

In *Scott*, after activating his emergency lights, the officer saw defendant swerve his bicycle and throw something "into a nearby grassy area before returning to the street" when "it was still very dark". A search of the area where he saw him throw it found a crack pipe.

In *Lewis*, police stopped a car at 5:30 a.m. and saw defendant "lean towards his left side with both hands then emerge quickly … slumped over at his midsection, with his hand towards his mouth", "chewing something and had a plastic bag sticking partially from his mouth" that he refused to spit it out when first asked. The bag had what looked like mari-juana, and they saw a white substance in his mouth. He continued to refuse to spit out "the remaining contents of his mouth and continued chewing" despite efforts to open his mouth to retrieve it. Doctors later retrieved a plastic bag with traces of cocaine from his mouth and a gram of cocaine from his stomach. 56 S.W.3d at 618-620. Concealing was found from his "put[ting] the cocaine in his mouth and swallow[ing] it" and "refus[ing] to spit [it] out…, or otherwise allow its removal after being ordered". *Id*. at 625. *Compare, Yarbrough, supra*(in-suficient evidence for completed or attempted tampering-by-destroying by swallowing).

[36]/ *Gatian* also distinguished *Thornton, supra*, noting it did "not have an officer 'repeatedly con-firm[ing]… the object [defendant] removed from his pocket … was never concealed from him because it never left his sight", and compared *Lujan, supra*. 393 S.W.3d at 402 n.1.

(Tex.App.-Austin, October 27, 2017, no pet) (unpublished).[37] The State appears to offer them as analogous based on its notion that police who arrive later "be[ing] directed" to the "thing" by non-law enforcement witnesses - who did observe the concealing act and "never lost sight of" the "thing", the thing was in clear and open view at all relevant times, and police observed and recognized its potential relevant without having to search or any difficulty - **is the same as police never seeing it until finding it in a subsequent search.** Appellant disagrees.

There is a obvious and critical difference between the facts in Appellant's case and

> -- throwing something from a car during a "30-60 miles per hour" chase along a "largely unlit rural road at night", which police only found because they later search the route, *Turner*, *supra,*
>
> -- officers finding a bag of marijuana and a bag of methamphetamine inside a closed coffee cup in the cab of a truck, during a consensual search of it, *Work*, *supra*; or
>
> -- when "it was dark", slipping a baggies out of clothing and into a companion's hand, who "continued to hold" her "hand" then "tossed it to the side… not facing the officers", "made no effort to inform the officers", and officers did not find it until the companion returned to his car, *Tooker*, *supra*.

G. The Court of Appeals holding does not lead to absurd results and the State's claims of policy complications are incorrect.

First, the State's hypotheticals ("drug-dealing passenger", "girlfriend", "reluctant witness") rests on its assertion that the Court of Appeals held "'an item

[37]/ The State cites these cases at 18 n. 44, 20 n.58, 24-25 n.81 & 82, and 26 n. 83.

cannot be concealed if *anyone* else observes it'", nor "that evidence is not 'concealed' if *anyone* observes the item, regardless of whether that person reports it." *State's Brief,* at 15, 27(emphasis in original). It did not; it holding is limited to the facts of Appellant's case: e.g., the witnesses had no connection with the incident other than bystander witnesses, called 911 to report it thereby initiating the investigation, remained on scene and told the police what they saw and "directed" them to the "thing" when they arrived. The "drug-dealing passenger", "girlfriend", "reluctant" or delayed witness are easily distinguished.

In addition, the cases show these fears are overblown and unrealistic. In addition to Appellant's case, *Villareal*, *Hollins, May* and *Ramirez* all had civilians who quickly contacted police to report. The 911 system is built on the idea that average people will report crime they witness, and seems remarkably successful. In addition, if the accomplice, passenger or "girlfriend" do not testify, there is no evidence anyone "never lost sight of" the thing and the holding in this case, *Thornton* and *Villareal* does not apply. Further, *Work* and *Munsch* both involved potential accomplices, yet both resulted in prosecutions and convictions. In such cases, the State can do as was done there, or corroborate a testifying accomplice as *Tex.CodeCrim.Proc.*, Art. 34.18 provides. The State's hypothetical fears simply have nothing to do with this case.

Second, contrary the State's claim, the Court of Appeals did "establish

whether there is a time continuum that applies in determining when… conduct becomes 'concealment'." State's Brief, at 27. It is **the same as in *Thornton* and *Villareal*: the witness never lost sight of the thing**.

But, the State does not really mean "concealment" here, as its hypotheticals about a witness waiting "several hours or two years" show. *Id*. at 28. Of course, that has nothing to do with Appellant's case. It is not surprising the Court of Appeals did not address facts not present in the case before it, or add an advisory opinion. In other words, this argument is a strawman.

PRAYER

Wherefore, premises considered, Appellant respectfully prays this Honorable Court affirm the Thirteenth Court of Appeals holding that the evidence was insufficient to support conviction for completed Tampering With Physical Evidence, its reformation to Attempted Tampering With Physical Evidence, and remand for sentencing consistent therewith, and such other relief to which he may be entitled. It is unnecessary to remand to the Court of Appeals for further consideration of the altering issue because it fully considered and properly rejected the same arguments the State makes here when it overruled it *Motion for Rehearing* and *Motion For En Banc Reconsideration*.

RESPECTFULLY SUBMITTED,
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CERTIFICATE OF SERVICE: I, Christopher P. Morgan, hereby certify a true copy of the foregoing Motion has been served on January 28, 2019, electronically, by sending it through efile.TXCOURTS.gov service on the following at the address shown:

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CERTIFICATE OF WORD COUNT: I, Christopher P. Morgan, hereby certify the word count of this brief is 12, 846, excluding matters in *Tex.R. App.Proc.*, Rule 9.4(I)(1)).

/s/ Christopher P. Morgan
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